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ABSTRACT

Nine years after the 1972 Supreme Court ruling in "Branzburg v. Hayes" that journalists enjoy no constitutional privilege to withhold the names of sources and to conceal information from grand jury proceedings, a study was conducted to determine the courts' attitudes toward journalists' privilege and to test commonly held beliefs about its status in the courts. Four hypotheses concerning the outcomes of cases on the federal and state level were tested. Data were 129 subpoena cases reported in "The Media Law Reporter" and "News Media and the Law" from 1977 to 1980. Cases were broken into categories of state (82) and federal (47) and then further subdivided into civil and criminal. Cases were coded for state of origin, court's judgment (reveal or not reveal) and basis for decision--shield law, balance test, or technicality. Each case was followed through the appellate level. Analysis of data revealed that: (1) state courts upheld subpoena requests more frequently than did federal courts, (2) reporters were required to testify in more criminal than civil cases, (3) the balancing test was used in the majority of cases, and (4) the majority of cases were not appealed, and of those that were, 70% were upheld. From this data a pattern emerges in which state courts dominate these types of cases, reporters are at greater risk in criminal than civil proceedings, shield laws are ineffectual, and states have developed definite attitudes toward journalists' privilege. Also, in criminal cases, reporters must testify about as often during grand jury proceedings as during actual trials and a subpoena is just as likely to seek confidential information as sources. (JL)

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An Empirical Study of Post-Branzburg Cases Involving Newsmen's Privilege

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An Empirical Study of Post-Branzburg Cases Involving Newsmen's Privilege.

In 1897, a man accused of murder admitted to a newspaper reporter that, although he had not committed the murder, he had witnessed the crime.

Called upon to testify, the man invoked privilege because of communication with a journalist.

The court dismissed his plea with the statement that his request "scarcely merits comment." (1)

During the decades since, the issue of newsmen's privilege has merited much comment from the courts. So much, indeed, that lawyers and journalists alike are confused. (2)

In 1972, the Supreme Court ruled in Branzburg v. Hayes, that newsmen enjoy no constitutional privilege to withhold the names of sources and to conceal information from grand jury proceedings. (3) The decision was widely believed to sound the death knell of the newsman's privilege controversy. (4)

But a welter of confusing and often contradictory rulings by lower courts has kept alive newsmen's hope of ultimately acquiring broad First Amendment protection from revealing sources and information. (5)

Surprisingly, the most vocal opponents of absolute shield laws protecting newsmen from testifying, are some newsmen themselves. Jerry Chaney says, "We journalists should disown

our ironbound tenet that the press has an absolute right to keep sources confidential." (6)

The faking of a Pulitzer Prize-winning story this year by Washington Post reporter Janet Cooke has revived apprehensions of anti-shield newsmen that protection of news sources is an invitation to irresponsible and sloppy journalism. (7) Says Anthony Lewis, "It (First Amendment privilege) does not, and in my opinion it should not (exist)." (8)

Critics of shield laws charge that veiled sources are often fabrications or dummies to color stories according to the editor's tastes and undermine the media's credibility. (9)

At the other end of the spectrum, proponents of absolute shield laws maintain that forced disclosure of confidential sources and information has had a chilling effect on these sources and thereby hampered their constitutionally guaranteed right of newsgathering. (10)

Jack Landau says, "We are facing the most serious censorship threat to the press in recent memory." (11)

A 1973 survey of 1,000 Journalists by the Reporter's Committee for Freedom of the Press revealed that one-half claimed that they used confidential sources regularly and a significant number said that their sources were beginning to dry up. (12)

In some papers, editors sometimes kill stories when the threat of subpoena appears considerable. (13) Investigative

reporters say that they weigh the importance of a story before accepting confidential material. (14)

Twenty-six states have passed shield laws, which grant from absolute to limited privilege to newsmen. (15)

Although several bills have been sponsored in Congress in the aftermath of the Branzburg and Farber cases, a federal shield law has not yet evolved. (16)

Despite their failure in their legislative efforts in Congress to acquire federal constitutional immunity, reporters continue to refuse to disclose confidential information and sources.

Since 1970, the Newspaper Guild, which represents nearly 40 percent of the daily newspaper and wire service reporters in the United States, has bargained for a clause in a model contract, which would allow a reporter to refuse to disclose confidential information "without penalty or prejudice." (17)

In 1978, 25 percent of those contracts examined by a study had incorporated some form of protection for reporters refusing to disclose confidential sources or information. (18)

The sensitivity of reporters to the subject is understandable because a large fraction of the news reported by the media emanates from confidential sources. (19)

Hugh M. Culbertson, who examined the use of veiled attribution by newspapers and magazines found: 1) Veiled at-

tribution occurred in nearly one-third of all articles in 12 newspapers examined. (20), and 2) Veiled attribution occurred in 75 percent of the news stories in Time and 70 percent of the stories in Newsweek. (21)

Against the backdrop of significant reliance by the media on confidential sources, courts are increasingly hauling up reporters to force them to reveal their confidences.

The Reporter's Committee for Freedom of the Press said in 1976 that between 1960 to 1968, an average of 1.5 subpoenas were served on the press annually. The average jumped to 75 per year during the next two years and to 83 between 1970 to 1976. In 1976, the committee stopped counting, because it found it difficult to keep track of subpoenas. (22)

If courts had taken an absolutist view of the Branzburg decision and rejected all claims of newsmen's privilege, there would be no confusion. As it is, however, there have been conflicting interpretations of the decision by lower courts.

David Gordon underscores the confusion when he says, "The status of the constitutional law, and the law in general on this topic is much less than totally clear." (23)

On the basis of broad overviews of court decisions, researchers have developed rules of thumb delineating when the reporter may consider himself reasonably safe using confidential sources and when he is treading dangerous ground. (24)

The guidelines suffer from several inadequacies. To begin with, they have been drawn without an actual cataloguing of court cases and therefore, are not very reliable.

George M. Killenberg, who drew several conclusions on the basis of five reported and some unreported court decisions, said, "An analysis of post-Branzburg cases can only produce tentative conclusions because state and federal courts have been inconcistent in their decisions." (25)

Also, most of the researches were done in the immediate aftermath of the Branzburg ruling, when lower courts were still grappling with its interpretation. (26)

Nine years after the decision, courts can reasonably be expected to have evolved well-defined attitudes toward the issue.

The purpose of this study is to determine these attitudes and to test commonly accepted beliefs about the status of newsmen's privilege in the courts.

In the process, it is hoped, the study will determine if a pattern exists in court decisions and whether solid guidelines can be drawn to assist journalists without encumbering them with complex law.

Hypotheses

At the federal level, the attorney general has issued guidelines, which require all subpoenas to newsmen to be cleared by him. (27) The guidelines require that in every case a proper balance must be struck between the public's interest in the dissemination of information and ideas and the public's interest in effective law enforcement and the fair administration of justice. (28)

If the guidelines are effective and are being followed, the following hypothesis should hold:

Hypothesis 1--Requests for subpoenas are upheld more frequently in federal courts than in state courts.

This follows from the fact that in the absence of similar guidelines in state cases, only the strongest cases go to court in the federal system after the avoidable ones have been weeded out.

Killenberg concluded after a study of several court cases, "Certainly judicial developments have shown that Branzburg was not a death knell for press freedom, especially in civil actions where newsmen have been successful in defending their right to withhold the identity of sources." (29)

He added, "Much of the uncertainty which remains centers on the status of newsmen's privilege in criminal actions." (30)

John J. Watkins reached a similar conclusion. (31)

Hypothesis 2--Reporters are required to testify more frequently in criminal cases than in civil ones in both state and federal courts.

Nancy J. Guernsey, after an extensive study of post-Branzburg cases said, "Consequently, what appeared to be an ominious erosion of First Amendment protection has turned out to be a serious attempt by courts to balance competing interests." (32)

After cataloguing several cases, Guernsey found that courts mostly used the balance test on a case-by-case basis. (33)

Her observation suggests:

Hypothesis 3--State and federal courts at both the lower and appellate level decide a majority of the cases involving newsmen's privilege on the basis of the balance test.

It is widely accepted that legal costs are so prohibitive that most cases are settled at the lower court level. (34) The issue was raised in the privilege case involving Joe Pennington. (35) Besides, the Supreme Court has been conservative in overturning lower court judgments. In the past, it has refused, with one exception, to review all cases appealed to it. (36) This suggests:

Hypothesis 4--A majority of cases involving newsmen's privilege are not appealed, and in those that are, the lower court's judgment is usually affirmed.

Besides providing answers to the above hypotheses, it is expected that the data will throw light on a welter of other widely held beliefs regarding newsmen's privilege. Among others, it should answer just how effectual state shield laws actually are. Also proposed to be examined is the possibility that different states may have fairly well-defined, even if contradictory, attitudes toward the issue of newsmen's privilege.

Indeed, a 1972 study by the Freedom of Information Committee of the Associated Press Managing Editors' Association found considerable variation in the state-to-state use of subpoena power. (37)

This suggests that the confusing scenario at the national level could be the result of very definite, even if contradictory postures of state courts.

Methodology

This study analyzed 129 subpoena cases reported in all the issues of the Media Law Reporter and News Media and the Law for the years 1977 through 1980. (38)

In all, 85 cases were drawn from News Media and the Law and 44 from the Media Law Reporter.

The period 1977 to 1980 was considered for three reasons:

1) Both the Media Law Reporter and the News Media and the Law, which report the largest number of cases involving newsmen's privilege, commenced publication in 1977.

2) The initial confusion over Branzburg had died down and courts were expected to have evolved definite attitudes on the issue.

3) The Reporter's Committee for Freedom of the Press had stopped cataloguing cases after 1977, and therefore information after 1977 was skimpy. (39)

The following steps were followed in coding lower court cases:

1) All cases were broken into two categories-- state and federal

2) They were then categorized under civil and criminal.

3) Criminal cases were categorized under grand jury proceedings and trials.

4) Civil cases were categorized under those in which a reporter was a party and those in which he was not.

5) Cases were coded for

a) State of origin.

b) Court's Judgment: reveal or not reveal.

c) Basis for decision: shield law, if one existed; balance test, in which the court balanced competing constitutional rights; no explanation, in which the court did not give any explanation for its decision.

In this category, those cases in the News Media and the Law, in which the court's explanation was either not reported at all, or not reported adequately, were also included.

d) Technical--if the decision was based on some technicality. (41)

6) Each case was next followed up to the appellate level. The same categories were used as in lower court cases. But the court's judgment under category 5(b) was recorded under four heads instead of two, these being: a) upheld, in which the court upheld the lower court's verdict; b) reversed, in which it reversed the verdict; c) rejected, in which a reviewal was denied, and d) No appeal, including those cases, which were either not appealed, or if the appeal was not reported.

A few caveats:

Although this study covers all cases reported in the two journals, it is unlikely that all cases that went to court

between 1977 to 1980 were reported by these Journals. This study covers an average of 32 subpoenas per year, while an earlier estimate predicted 150 subpoenas are served on reporters every year. (42)

Recognising this, and keeping in view that the sample size is 129, a significance level of 10 percent has been chosen to ensure validity of data (43)

Considering that this study draws on the largest sample size yet, its results are far more reliable than those drawn by earlier studies, most of which examined fewer than 30 cases. (44)

Occasionally, reporters have complied with subpoenas because they felt that the information was not worth protecting, being of a non-confidential nature, or from fear that their case was so weak that an unfortunate judicial precedent might be set. (45) Because of the definition of categories, these cases may reflect adversely on the media when, in fact, the media were disinterested in the outcome. (46)

Observations

Forty-seven (36 percent) of the cases were in federal courts and 82 (64 percent) in state courts.

State courts upheld subpoena requests more frequently (59 percent of the time) than did federal courts (39 percent).

Hypothesis 1 was therefore rejected.

Reporters were required to testify in 58 percent of the criminal cases and in only 42 percent on the civil cases, confirming hypothesis 2.

The balancing test was used in 55 percent of the cases verifying hypothesis 3. The test was used in 58 percent of the 46 cases ruled upon by the appellate courts, further confirming hypothesis 3.

Eighty of the 129 cases were not appealed. Three others were denied reviews. They represented 66 percent of all cases. Of the ten cases appealed to the Supreme Court, reviews were declined in nine.

Rulings of lower courts were upheld in 70 percent of the cases decided by the appellate courts.

Hypothesis 4 was therefore confirmed.

In other observations:

State shield laws were invoked by courts in only seven (6 percent) of the 129 cases.

In civil cases, courts are inclined to be more liberal with reporters in cases in which they are not party than in those in which they are party.

Testimony was required from reporters in 51 percent of the cases in which they were party and in only 33 percent of the cases in which they were not party.

Data were not considered adequate to fully test whether different states had evolved definite attitudes toward the issue of newsmen's privilege. However, general patterns seem to be developing in some states where adequate number of cases were available.

State courts in California, Massachusetts, Michigan, New Jersey, and Vermont are inclined to require reporters to disclose sources in criminal trials. Florida, on the other hand, provides them the maximum protection. The District of Columbia, similarly, provides unqualified protection to reporters subpoenaed to testify in criminal trials. New Jersey provides virtually none.

In civil cases in federal courts, Illinois, Michigan, New York and Pennsylvania favored Journalists. New Jersey and Texas did the reverse.

Data were not adequate to indicate a discernible trend in civil cases in state courts.

Conclusions

Most of the broad generalizations drawn by earlier researchers were proven, but some were not. Some that were confirmed, were confirmed so marginally that their validity is at best questionable.

A summary of the observations reveals an emerging pattern:

1) State courts subpoena reporters more frequently than do federal courts.

2) Federal courts uphold subpoena requests less frequently than state courts. This implies that the attorney general's guidelines are either ineffectual, or are not being adhered to. It is even possible that subpoenas in federal courts are not as frequent, not because of the attorney general's guidelines, but because federal courts protect newsmen more. At any rate, a reviewal of the guidelines is called for.

3) Although reporters are protected more frequently in civil cases as compared to criminal cases, the threat of subpoenas in civil cases in still considerable, notwithstanding Killenberg's observation. (47)

4) Reporters are comparatively safer in civil cases in which they are not party, than in those in which they are

party. In the latter instance, the chance of their having to testify is almost as high as in criminal trials.

5) The lobbying for state shield laws is wasted because the laws have proved ineffectual. Greater effort should be directed toward the balancing test and First Amendment protection.

6) Decisions on newsmen's privilege tend to be made at the lower court level. In only 10 percent of the cases were the lower court decisions appealed, and sometimes by then the issue had become moot. (48)

However, 12 (86 percent) of the 14 reversals went in favor of reporters. It would seem to be in the reporters' interests therefore to appeal adverse decisions. The dice are certainly loaded on their side during appeal.

7) Many states have developed fairly well-defined attitudes toward the subject of newsmen's privilege. It would seem a worthy exercise for researchers to catalogue that state's cases on newsmen's privilege to determine possible patterns.

Two other observations, not tested as hypotheses for purposes of this study also emerged.

a) For purposes of a reporter's testimony in criminal cases, it is immaterial whether testimony is required during grand jury proceedings or during actual trials. The chances of a reporter being required to disclose confidential sources were 56 percent in the former and 59 percent of the latter.

This is significant, because of a widespread view that Branzburg has effectively shut the door on grand jury proceedings, but left the law nebulous on criminal trials. (49)

b) It is also immaterial whether the subpoena seeks confidential information or sources. The chances of a reporter being required to disclose were approximately 50 percent in both.

Recent court rulings mandating that qualified privilege extends only to confidential sources and not information, therefore, have not become the accepted rule. (50)

This limited study is only a forerunner of what a much more indepth study, examining all state and federal cases, would look.

Even this limited study has evolved definite patterns. A study drawing on more cases would remove the blurrings and evolve concrete guidelines upon which a reporter can rely, rather than the existing ones on which he can only hope.

APPELLATE COURT DECISIONS

	State		Federal		Both	
Decision	Civil	Criminal	Civil	Criminal	Civil	Criminal
No Appeal	16 (60)	32 (58)	19 (68)	13 (68)	35 (64)	45 (61)
Upheld	7 (26)	15 (27)	5 (18)	5 (26)	12 (22)	20 (27)
Reversed	3 (11)	7 (13)	4 (14)	0 (0)	7 (13)	7 (9)
Rejected	1 (3)	1 (2)	0 (0)	1 (6)	1 (2)	2 (3)
Total	27 (100)	55 (100)	28 (100)	19 (100)	55 (100)	74 (100)

Note: Figures in brackets are percentages.

Percentages may not add up because of rounding.

BASIS FOR LOWER COURT DECISIONS

	State		Federal		Both	
Basis	Civil	Criminal	Civil	Criminal	Civil	Criminal
Balance	17 (63)	28 (51)	18 (64)	9 (47)	35 (64)	37 (50)
No explanation	8 (29)	7 (13)	3 (11)	4 (21)	10 (18)	11 (15)
Shield	1 (3)	1 (2)	5 (18)	0 (0)	6 (11)	1 (1)
Technical	1 (3)	19 (34)	2 (7)	6 (32)	3 (5)	25 (32)
Total	27 (100)	55 (100)	28 (100)	19 (100)	55 (100)	74 (100)

Note: Figures in brackets are percentages.

Percentages may not add up because of rounding.

LOWER COURT DECISIONS

	State		Federal		Both	
Nature of Case	Reveal	Not Reveal	Reveal	Not Reveal	Reveal	Not Reveal
Civil/Party	10 (67)	5 (33)	7 (39)	11 (61)	17 (52)	16 (48)
Civil/Non Party	4 (33)	8 (67)	3 (30)	7 (70)	7 (32)	15 (68)
Criminal/Trials	28 (62)	17 (38)	6 (46)	7 (54)	34 (59)	24 (41)
Grand Jury Trials	6 (60)	4 (40)	3 (50)	3 (50)	9 (56)	7 (44)
All Civil	14 (52)	13 (48)	10 (36)	18 (64)	24 (43)	31 (57)
All Criminal	34 (62)	21 (38)	9 (47)	10 (53)	43 (58)	31 (42)
Both Civil/Criminal	48 (59)	34 (41)	19 (39)	28 (61)	67 (52)	62 (48)

Note: Figures in brackets are percentages.

NOTES

1. *People* v. *Durrant*, 116 Cal. 179, 220, 48 p. 75 (1897).

2. See e.g. David Gordon, *Newsman's Privilege and the Law*, Columbia, Mo.: Freedom of Press Center, 1974, cited by Don R. Pember, *Mass Media Law*, Dubuque, Iowa: Wm. C. Brown Company Publishers, 1977, p. 303; Charles W. Whalen, Jr., *Your Right to Know*, New York, N.Y.: Random House, 1973, p. 106; Maurice Van Gerpen, *Privileged Communication and the Press: The Citizen's Right to Know versus the Law's Right to Confidential News Source Evidence*, Westport, Conn.: Greenwood Press, 1979, p. 121; John J. Watkins, "The Status of Confidential Privilege for Newsmen in Civil Libel Actions," *Journalism Quarterly*, Autumn 1975, p. 505; George M. Killenberg, "Branzburg Revisited: The Struggle to Define Newsman's Privilege Goes On," *Journalism Quarterly*, Winter 1978, p. 703.

3. *Branzburg* v. *Hayes*, 408 U.S. 665, (1972).

4. See e.g. Killenberg, "Branzburg Revisited," p. 703; Killenberg, "Branzburg abd Beyond: A Study of the *Branzburg* v. *Hayes* decision, its antecedents and its implications," Master's thesis, Southern Illinois University, 1975; "The Newsman's Privilege after *Branzburg* v. *Hayes*: Whither Now?" *The Journal of Criminal Law and Crimimology*, 64:218, 239 (1973).

5. "Let's take our case to the Public and the Lawmakers," *Quill*, March 1979, p. 23.

6. Jerry Chaney, "Level with us, just how sacred is your source?" Quill, March 1979, p. 28.

7. David A. Maraniss, "Post Reporter's Pulitzer Prize is withdrawn," Washington Post, April 16, 1981, p. 1.

8. Anthony Lewis, "The First Amendment Hubris," New York Times, April 19, 1981, p. 24.

9. See e.g. Dwight MacDonald, "Time and Henry Luce," The Nation, Vol 144, May 1, 1937, p. 502; Otto Friedrich, "There are 00 Trees in Russia: the Fiction of Facts in Newsmagazines," in Rod Holmgren and William Norton, eds., The Mass Media Book, Englewood Cliffs, N.J.: Prentice Hall, Inc., p. 170-82.

10. Pember, Mass Media Law, p. 293.

11. "The Press after Farber," Quill, March 1979, p. 23.

12. Pember, Mass Media Law, p. 293.

13. Peter Schrag, "The Sacramento Bee Censors Itself," Quill, March 1979, p. 26.

14. Clark R. Mollenhoff, "You'd better know what you are getting into," Quill, March 1979, p. 27.

15. Van Gerpen, Privileged Communication, p. 126.

16. Ibid., p. 147.

17. Gail Lund Barwis, "Contractual Newsroom Democracy," Journalism Monographs, No. 57, August 1978, p. 20.

18. Ibid.

19. Pember, Mass Media Law, p. 293.

20. Hugh M. Culbertson, "Veiled Attribution— An Element of Style?" Journalism Quarterly, 1978, p. 456-465.

21. Ibid., p. 460.

22. Curtis D. MacDougall, "The Press at Bay," Bill of Rights Journal, Vol. 13, December 1980, p. 11.

23, Gordon, Newsman's Privilege, cited by Pember, Mass Media Law, p. 309.

24. See, e.g., Pember, Mass Media Law, p. 303.

25. Killenberg, "Branzburg Revisited," p. 704.

26. See, e.g., Floresta Deloris Jones, "Newsman's Privilege: A First Amendment Controversy," Master's thesis, Michigan State University, 1975; Dorinda Elliott Freeman, "Newsman's Privilege," Master's thesis, University of North Carolina, 1973.

27. 5. Med. L.R. 2153.

28. Ibid.

29. Killenberg, "Branzburg Revisited," p. 706.

30. Ibid.

31. Watkins, "The Status of Confidential Privilege," p. 505.

32. Nancy J. Guernsey, "Branzburg and its Consequences: Impact on State Courts," Master's thesis, University of Maryland, 1975.

33. Ibid.

34. See, e.g., Van Gerpen, Privileged Communication, p. 98.

35. "Will Joe Pennington be the next reporter to go to jail?" Quill, March 1979, p. 13.

36. The exception was, Herbert v. Lando, 47 U.S.L.W. 4401, April 18, 1979.

37. Van Gerpen, Privileged Communication, p. 133.

38. News Media and the Law, October 1977, December 1977, April 1978, July 1978, January 1979, May/June 1979, August/September 1979, November/December 1979, March/April 1980, June/July 1980, August/September 1980, October/November 1980.; Media Law Reporter, Nos. 1, 2, 3, 4, 5, 6.

39. MacDougall, "The Press at Bay," p. 11.

40. See e.g. Avilla v. Shirai, Civ. No. 56035, (Hawaii Cir, Ct., Honolulu County, September 12, 1979).

41. See e.g. Times Publishing Co. v. Burke, 375 So. 2d 297, (Fla. Dist. Ct. App. 1979); In re Rutti, Nos. CA-1771, CA 1782 (Ohio Ct. App. Reichland County, July 13, 1979); Goldfeld v. Post Publishing Co. No. 168062, (Conn. Super. Ct., Fairfield County, September 19, 1978); People v. LeGrand, Crim. No. 1446/78, (N.Y. Sup. Ct., Kings County, December 29, 1978).

42. MacDougall, "The Press at Bay," p. 11.

43. Earl R. Babbie, The Practise of Social Research, Belmont, Ca.: Wadsworth Publishing Company, Inc., 1979, p. 539.

44. See e.g. Van Gerpen, Privileged Communication, p. 18-19; Killenberg, "Branzburg Revisited," p. 705.

45. See e.g., In re ABC, Inc. and Barry Serafin, subpoena issued January 25, 1980 (S.D.N.Y.); In re Investigative File, No 14518, (Mont. October 2, 1978).

46. Ibid.

47. Killenberg, "Branzburg Revisited," p. 704.

48. See e.g., Brown v. Traub, No. 12,488 (N.M. May 2, 1979) (writ of prohibition denied), cert denied, No 79-272 (U.S. December 3, 1979).

49. Branzburg v. Hayes, 408 U.S. 665, (1972).

50. See e.g. People v. Meyer, No. 78 CF 414, 22, (Ill. Cir. Ct., Kane County, December 15, 1978).